In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 219

In the Matter of
THE ALLIED PRODUCTS COMPANY,
Bankrupt.

CONTINENTAL CASUALTY COMPANY,
Petitioner,

vs.

HAROLD H. BARNETT, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF IN SUPPORT OF PETITION.

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INDEX.

(4) In determining the question of default under the bankrupt's assignment of retained percentage to the surety by reason of its failure to pay for material used in the work when payment was due, as a question of fact rather than as a question of law..... 15

(5) The decision of the Circuit Court is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of *Employers Casualty Co. v. Rockwell County,* 35 S. W. (2) 692, which follows the general rule holding that failure of a contractor to pay bills for material when due is, as a matter of law, a default under the contractor's assigment of deferred payments to surety, the District Court and the referee in the present matter holding that default under similar circumstances is a question of fact and not of law, which holding the Circuit Court affirmed 15

(6) The decision of the Circuit Court in the present matter is in conflict with and has failed to apply the rule of law adopted by this Court in the case of *Nelson vs. Montgomery Ward Co.,* 312 U. S. 373, which holds that the effect of admitted facts is a question of law..... 16

AUTHORITIES CITED.

Cases.

Texts.

Statute.

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Bankrupt, a road construction company, executed three contracts of indemnity, similar in condition, to its surety, the Continental Casualty Company, the appellant, on three separate construction contracts with the State of West Virginia. (R. 7, 22.)

The first (Nicholas County) was completed without loss in December, 1938, and on which there was a balance

of $2,466.04 due the contractor. (R. 22.) The second (Jackson County) was completed without loss in November, 1938, and on which there was a balance due the contractor of $3,746.45. All bills for material on both contracts were paid by the contractor and there was no default thereunder. (R. 23.)

The third contract (McDowell County) was completed November, 1939, the contractor failing to pay for material bills when due in the sum of approximately $13,884.66, which Continental paid. The Trustee in Bankruptcy, upon the Court's order, turned over to the Continental the sum of $9,875.88 on account thereof, this latter being the balance of the contract price for the work which was completed. (R. 23.)

The loss of the Surety on the third contract was in excess of $4,008.78 and it was to make good this loss that it endeavored to obtain the balances due from the State of West Virginia under the first two contracts above described.

Under the Indemnity Agreements the contractor, the Bankrupt, assigned to Continental, the surety, the amounts due it under the three contracts, to become effective, however, only upon a breach of the contracts or any bonds or a default in discharging its liabilities and paying its material bills when due. Both the Continental and the Trustee in Bankruptcy claimed the retained balances arising out of the two contracts completed without loss.

The case has been submitted throughout on an Agreed Statement of Fact. (R. 21.)

The Referee found as a fact that there was no default by the Bankrupt in failing to pay for material when due, and held against Continental. (R. 31.) The District Court, after stating in effect that if there had been a default shown, it would have found in favor of Continental, said, "The Referee's finding (of fact) that there was no de-

fault is determinative of the case." (R. 46.) It also overruled Continental's Petition for Rehearing.

The Circuit Court of Appeals affirmed the District Court on the sole ground that where there has been a concurrent finding of fact by the Referee and the District Court, the Circuit Court will not disturb such finding of fact unless plain mistake is shown, which showing Continental did not make (R. 66). Petition for Rehearing was denied May 31st, 1943.

It is to correct and reverse these erroneous rulings that this Petition for Certiorari is filed.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925 c. 229 (43 Stat. 938; 28 U. S. C. A. 347). The decree of the Circuit Court of Appeals was entered April 8th, 1943. (R. 59.) Petition for Rehearing was denied May 31st, 1943. (R. 79.) This Petition for Certiorari is filed in this Court before the expiration of three months from May 31st, 1943.

QUESTIONS PRESENTED.

We are asking the exercise of the discretionary power of this Court to the end that the following questions may be resolved.

(1) Whether the Referee or the District Court has the right to ignore an agreed statement of fact upon which a case is submitted and to make a finding of fact other than and beyond any fact contained in the agreed statement of fact upon which a case is submitted. In the instant case the Referee made and the District Court approved and adopted a finding of fact contrary to the agreed statement of fact and contrary to the rule of law of the various States and the Federal jurisdiction.

(2) Whether the Circuit Court of Appeals was correct in its refusal to consider the case on the merits of the propositions of law submitted, it having so refused, basing its decision solely on an unwillingness to disturb an unlawful and unjustifiable concurrent finding of fact by the Referee and District Court, such as is described in paragraph (1) of this Caption.

(3) Whether the Circuit Court of Appeals was correct in affirming the District Court on the authority of the cases cited in its opinion (R. 67), all of which authority was to the effect that where there is a concurrent finding of fact by a Referee and the District Court it will not be set aside on anything less than a demonstration of plain mistake, when, as in the present matter, the case was submitted on an Agreed Statement of Fact containing no statement of fact such as the District Court and Referee found, and the question determined as fact was one of law.

(4) Whether the question of default, under the Bankrupt's Assignment of Retained Percentage to the Surety, arising out of its failure to pay for material used in the work when payment was due, is a question of law or fact, the Circuit Court in the present matter having regarded the question of default under the circumstances mentioned as one of fact and not of law.

(5) Whether the Court of Appeals in the present matter is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of *Employers Casualty Co. vs. Rockwell County*, 35 S. W. (2) 690, 692 (Texas 1931) which follows the general rule, and which holds that failure of a contractor to pay bills for material when due, as a matter of law, is a default under contractor's assignment of deferred payments to surety, the Court of Appeals, the District Court and the Referee, in the present matter, holding that default under similar circumstances is one of fact and not of law.

(6) Whether the Court of Appeals in the present matter is not in conflict with and has failed to apply the rule of law adopted by this Court in the case of *Nelson vs. Montgomery Ward Co.*, 312 U. S. 373, which holds that the effect of admitted facts is a question of law.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Petitioner respectfully submits, as its reasons for the allowance of the writ, that:

(a) The decision of the Circuit Court of Appeals is in conflict with the decision of another Circuit Court of Appeals (Fifth Circuit) on the same question as that involved herein.

(b) The decision of the Circuit Court of Appeals decides a question in a manner in conflict with applicable decisions of this Court.

(c) The decision of the Court of Appeals has decided an important question of general law in a manner untenable and in conflict with the overwhelming weight of authority.

(d) The questions involved herein are of importance, as they will arise on every occasion on which a case is tried on agreed facts, or in which indemnity assignments of retained balances of contract price to sureties are the basis of the action.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit of Appeals for the Sixth Circuit, commanding that Court to certify to this Court, for review and determination the full and complete transcript of the record and proceedings in the case entitled *Continental Casualty Company, Appellant, vs. Harold H. Barnett, Trustee, etc., Appellee (In re Allied Products Company, In Bankruptcy, etc.)*, being cause No. 9301 on the docket of the said Court of Appeals, and that

the decree of the said Court of Appeals in said cause may be reversed by this Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

CONTINENTAL CASUALTY COMPANY,

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Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SUMMARY.

The point for which the appellant is contending is simply this:

The Bankrupt executed indemnity contracts to the Petitioner surety assigning it all retained amounts or percentages due under various contracts, the assignment to become operative only upon default under any of its construction contracts, including failure to make payment when due for material used in the construction. Payment for material when due not having been made under one of three construction contracts, the Petitioner surety claimed the retained amounts due on the remaining two as a credit on its loss under the third contract, the surety having paid the materialmen. The Trustee in Bankruptcy claimed these amounts as against the appellant surety.

This issue was submitted on an Agreed Statement of Fact (R. 21) in which the ultimate facts were set forth.

The Referee found as a fact that there was no default and held against the Petitioner surety. The District Court adopted the finding of fact as to the absence of default and held against the Petitioner surety. The Circuit Court affirmed the District Court on the sole ground that where there is a concurrent finding of fact by the Referee and District Court, the Circuit Court would not disturb the same, refusing to consider any of the propositions of law submitted to it by the Petitioner surety.

Our contention is that—

(a) The Referee had no right to make, nor the District Court to adopt, a finding of fact in view of the Agreed Statement of Fact, which they were bound to accept.

(b) The question of default is one of law and not of fact.

(c) This being true, the Circuit Court could not possibly affirm the lower Court on the ground that it would not disturb a ruling of the lower Court based upon concurrent findings of fact by the Referee and the lower Court, they under the circumstances of the present matter having no right to determine fact, nor was the question determined one of fact.

(d) The Circuit Court should have found that under the established facts of the Agreed Statement, default, as a matter of law, had been shown to have taken place when the Bankrupt failed to pay bills for material which were due before the Bankruptcy and which should have been then paid, but which the Petitioner surety eventually was compelled to pay, and that the claim of the Petitioner should therefore prevail. (35 S. W. (2) 692.)

A.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported in 134 F. (2) 725, 728 (Advance Sheets May 31, 1943). The opinion of the District Court has not been reported at this date.

The opinions of the Circuit Court, District Court and Certificate of the Referee appear in the Record as indicated below.

Opinion of the Circuit Court of Appeals filed April 8, 1943 (R. 60, 65).

Opinion of District Court filed March 30, 1942 (R. 46).

Certificate of Referee upon Petition for Review of Continental Casualty Company filed in District Court August 27, 1941 (R. 36-39 inc.).

B.

JURISDICTION.

The basis upon which the jurisdiction of this Court is invoked is fully set forth under the caption "Jurisdiction" in the Petition for Certiorari (*supra*, p. 3) and, while omitted from this Brief in the interest of brevity, is adopted as a part hereof.

C.

STATEMENT OF CASE.

A full statement of the case has been set forth in the Petition for Certiorari herein (*supra*, pp. 1-3) and for the sake of brevity will not be repeated.

D.

SPECIFICATION OF ERRORS.

The specifications of error which follow appear in interrogative form under the caption "Questions Presented" in the Petition for Certiorari (*supra*, pp. 3-5) with corresponding paragraph numbering.

The contention of Continental is that the Referee, District Court and Circuit Court committed material error in the following particulars.

(1) In making, adopting and affirming a finding of fact made by the Referee—

(a) When the case had been submitted on an agreed statement of fact which controlled the facts of the case,

(b) Which agreed statement showed no fact such as was found.

(2) In the refusal of the Circuit Court to consider the case on the propositions of law submitted and

in basing its refusal solely upon its unwillingness to disturb an unlawful and unjustifiable concurrent finding of fact by the Referee and District Court, such as is described in par. (1) of this caption.

(3) In the Circuit Court's affirming of the District Court on the authority of the cases cited in its opinion (R. 67), all of which authority is to the effect that where there is a concurrent finding of fact by a Referee and District Court, it will not be set aside on anything less than a demonstration of plain mistake, when, in the present matter, the case was submitted on an agreed statement of fact which did not contain the fact found by the Referee and the question so determined as fact was one of law.

(4) In determining the question of default under the Bankrupt's assignment of retained percentage to the surety, by reason of its failure to pay for material used in the work when payment was due, as a question of fact rather than as a question of law.

(5) The decision of the Circuit Court is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of *Employers Casualty Co. vs. Rockwell County*, 35 S. W. (2) 690, 692, which follows the general rule, holding that failure of a contractor to pay bills for material when due is, as a matter of law, a default under the contractor's assignment of deferred payments to surety, the District Court and the Referee in the present matter holding that default under similar circumstances is a question of fact and not of law.

(6) The decision of the Circuit Court in the present matter is in conflict with and has failed to apply the rule of law adopted by this Court in the case of *Wilson vs. Montgomery Ward Co.*, 312 U. S. 373, which holds that the effect of admitted facts is a question of law.

E.

ARGUMENT.

To avoid confusion we desire at the outset to inform the Court of the close connection of the present matter with that of the Maryland Casualty Company vs. the appellee herein (Circuit Ct. No. 9286) now pending in this Court on Petition of Bankrupt Trustee for Certiorari. (No. 1102, Oct. Term, 1942.) The two cases were heard together before the Referee, the District Court and the Circuit Court. The opinion of the District Court (R. 41-46) and of the Circuit Court (R. 60) deals with both cases. The situation in each with respect to the Bankrupt was substantially the same. The District Court, affirmed by the Circuit Court, permitted the recovery by Maryland of the retained contract balances it sought. Continental was not permitted to recover the retained balances which it sought, the difference between the two cases being described in the opinion of the District Judge (R. 46). For ease of reference it is here quoted.

> "The factual situation presented here is very similar to that involved in Maryland Casualty Company's petition for review. There is, however, a distinguishing factor here which, as I see it, bars completely the surety's right to prevail over the trustee, and that is the failure of the surety to establish that a default occurred prior to bankruptcy.
>
> "It was determined in the Maryland case that assignments such as are involved here become effective only after default. Therefore, in order for the surety to claim priority over the trustee, it was essential that it show a default prior to bankruptcy, at which time the trustee's lien attached.
>
> "No such showing having been made, the Referee's finding that there was no default is determinative of the case."

It is agreed that unless it showed "default" Continental could not prevail. It is of the finding as a fact that Continental had showed no default that we, among other things, complain. It is submitted that if Continental had been found to have shown default, as a matter of law, it would have been successful in its efforts in this proceeding.

In the following we consider separately each paragraph of the Specification of Errors.

(1) In making, adopting and affirming a finding of fact made by the Referee (a) when the case had been submitted on an agreed statement of fact which controlled the facts of the case, (b) which agreed statement of fact showed no fact such as was found.

The Referee had no right to make a finding of fact in view of the case having been submitted on an agreed statement of fact. The Referee himself states (R. 26):

> "This matter coming on to be heard upon * * * the agreed statement of facts between surety and the trustee * * *."

and in support of the above contention we submit the following authority:

> "Upon the submission of a controversy * * * upon an Agreed Statement of Facts, it is a general rule in the absence of an agreement by the parties to the contrary * * * that the Court can draw no inference of fact in favor of either party, even from the facts stipulated, except such inferences as a *matter of law* are necessary inferences."
>
> 2 *American Jurisprudence*, p. 384, par. 23, and cases there cited.
>
> "(2) When a case is tried and submitted on Agreed Statement of Facts, the statement becomes the Court's

Finding of Fact and has the effect of a special verdict and in pronouncing judgment thereon the Court is bound by the stipulation."

McCarthy vs. Employers Ins. Co., 97 A. L. R. 292 (Annot.) (Mont. 1934);
61 F. (2) 14.

"If the facts are agreed upon and the questions of law alone are submitted to the court for its judgment, the Court can only respond to the questions of law arising from the admitted facts, and will not infer another fact and pronounce the law arising thereon."

25 *R. C. L.*, p. 1105, par. 13;
312 U. S. 373.

"So also the Court is conclusively bound by the facts stated and must render judgment according as the facts agreed upon require."

60 *C. J.*, p. 84, par. 78;
60 *C. J.*, p. 1191, par. 985.

(2) In the refusal of the Circuit Court to consider the case on the propositions of law submitted and in basing its refusal solely upon its unwillingness to disturb an unlawful and unjustifiable concurrent finding of fact by the referee and District Court such as is described in paragraph (1) of specification of errors.

(3) In the Circuit Court's affirming of the District Court on the authority of the case cited in its opinion, which authority is to the effect that where there is a concurrent finding of fact by a referee and District Court, the Circuit Court will not set it aside on anything less than a demonstration of plain mistake.

The Circuit Court in its opinion (R. 66) says:

"The District Court has confirmed the finding of fact of the Referee that default did not occur prior to

that time. Concurrent findings of fact of a referee in bankruptcy and a District Judge will not be set aside by a Circuit Court of Appeals on anything less than demonstration of plain mistake. See *Kowalsky v. American Employers Ins. Co.*, 90 F. (2d) 476, 480 (C. C. A. 6), and cases there cited.

"There has been no showing in this case that the Referee and the District Judge were plainly mistaken in their concurrent finding of the decisive fact. Upon the evidence in the case, a contrary finding below would have been clearly erroneous."

The *Kowalsky* case (R. 67) upon which the Circuit Court relied, applies only to such finding of fact as is made where there is a disagreement and dispute in the evidence in relation to its establishment and has no application to cases similar to the present matter where the fact is established by agreement between the parties, there being nothing left for the fact-finding entity of the court to determine.

We understand and appreciate the respect in which appellate courts hold conclusion as to fact by the fact-finding authority in our trial procedure and their unwillingness to disturb the same. That attitude is adopted by this Court in its opinion. The *Kowalsky* case and every other case along the same line cited in the opinion in the *Kowalsky* case apply only to finding of fact where the facts were in dispute. They have not the slightest relation to conclusions of law nor to cases submitted on agreed statement of fact.

(4) In determining the question of default under the bankrupt's assignment of retained percentage to the surety by reason of its failure to pay for material used in the work when payment was due, as a question of fact rather than as a question of law.

(5) The decision of the Circuit Court is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of Employers Casualty Co. v. Rockwell County, 35 S. W. (2) 692, which follows the general rule holding that failure of a contractor to pay bills for material when due is, as a matter of law, a default under the contractor's assignment of deferred payments to surety, the District Court and the referee in the present matter holding that default under similar circumstances is a question of fact and not of law, which holding the Circuit Court affirmed.

There can be no question that whether there was a default or not in the present matter is a question of law.

The following citation is foursquare with the present case and determines conclusively that failure to pay for materials under circumstances comparable to those existing in the present matter is a default as a matter of law and not as a matter of fact, and even though there had been a dispute of testimony as to the fact in the present case, which there was not, of course, it would still be a question of law for the court to determine.

> "(3) Highway contractors failing to pay bills for material and labor, * * * *as a matter of law*, were in default within contractor's assignment to surety of deferred payments."
>
> *Employers Casualty Co. vs. Rockwell County*, 35 S. W. (2) 690, 692 (Texas, 1931).

and further as to "non-payment" constituting default as a matter of law:

"Ordinary meaning of the word 'default' when used with respect to an obligation created by contract is failure of performance, and, when used with reference to indebtedness, it simply means 'non-payment'."

Broadbury vs. Thomas, 27 P. (2) 402 (Calif.).

In the light of the indisputable authority of the cases cited above, and we find none holding otherwise, it is definitely established that "default or not" is a question of law and not of fact.

It should always be remembered that at no time has either the Referee, the District Court or the Circuit Court passed upon the proposition of the existence of a default except as a question of fact. Neither considered the matter as a question of law, nor passed upon it as such.

In the light of the foregoing it is obvious that the Circuit Court in the present matter is in conflict with the rule of law laid down by the Circuit Court of the Fifth Circuit in the case quoted above.

(6) The decision of the Circuit Court in the present matter is in conflict with and has failed to apply the rule of law adopted by this Court in the case of Nelson vs. Montgomery Ward Co., 312 U. S. 373, which holds that the effect of admitted facts is a question of law.

The *Nelson* case referred to in the caption of this paragraph is comparatively recent. The paragraph of the syllabus of the case applicable here is very short and is an exact quotation from the opinion of the court. The court in that case held—

"The effect of admitted facts is a question of law."

In the present matter the facts were admitted and agreed under the authority of the quoted language of the opinion of this Court in the case referred to in this subcaption, when this condition exists the operation and effect of the admitted facts is a question of law and must be so

considered by the court and so determined by the court. In the present case the facts were all agreed and were placed before the court in the form of an agreed statement of fact. From an agreed statement of fact it is submitted that the only question which can arise is one of law and in support thereof we have quoted the opinion of this Court in the case referred to in this sub-caption. In the present case the Circuit Court adopted exactly the opposite theory. From the statement of fact submitted to the Court in this case, the Referee in Bankruptcy and the District Court reached a conclusion of fact of their own and the Circuit Court rendered its opinion upon their erroneous conclusion and is therefore in conflict with and has failed to apply the rule of law adopted by this Court in the case to which we have referred.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors complained of may be corrected, and that for such purpose a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and reverse it.

Respectfully submitted,

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BRIEF OF RESPONDENT HAROLD H. BARNETT, TRUSTEE, OPPOSING PETITION FOR CERTIORARI.

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INDEX.

TABLE OF AUTHORITIES.

Cases.

Rules and Statutes.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 219.

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Bankrupt.

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BRIEF OF RESPONDENT HAROLD H. BARNETT, TRUSTEE, OPPOSING PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

The Petition for Certiorari, and the supporting brief, disclose that Petitioner Continental Casualty Company (hereinafter sometimes called "Continental") desires a review by this Court of the decision of the Circuit Court of Appeals for two principal reasons which Continental has stated in several different ways. Petitioner's two reasons are:

1. The Circuit Court of Appeals, the District Court and the Referee all found as a fact that there was no default on the part of Bankrupt. They had no right to make such a finding since the Agreed Statement

of Facts upon which the matter was tried did not justify any such finding.[1]

2. Default is a matter of law, and under the stipulated facts there was a default as a matter of law.[2]

Respondent contends that there is ample support in the record for the findings and decision of the Referee approved by both courts below, and that there is no valid ground for the issuance of a writ of certiorari.

STATEMENT OF FACTS.

Continental's Statement of Facts[3] requires some correction and amplification to present the issues made in their proper perspective. Respondent is the Trustee in Bankruptcy of The Allied Products Company, Bankrupt. Respondent's Bankrupt was a road contractor which entered into three paving contracts with the State of West Virginia. Petitioner is a surety company which as surety executed Bankrupt's performance bonds upon all three paving projects.

The first contract (Nicholas County) was entered into in 1937, and was completed in December, 1938 without default or loss to surety, and $2,466 remained due Bankrupt at the date of bankruptcy. The second contract (Jackson County) was completed without loss in November, 1938, and $3,746 remained due Bankrupt at the date of bankruptcy.

The third contract (McDowell County) was entered into in February, 1939 (R. 5), and was completed in November, 1939.

Bankruptcy occurred on February 15, 1940, when Bankrupt filed a petition for reorganization under Chapter X

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[1] "Questions presented" Nos. (1), (2), (3) and (4); petition pp. 3, 4.

[2] "Questions presented" Nos. (4), (5) and (6); petition pp. 4, 5.

[3] Petition pp. 1, 2. The petition and the supporting brief being bound together with consecutive paging will hereinafter be cited as "Petition" with appropriate page numbers.

of the Bankruptcy Act. Reorganization having failed, liquidation was ordered in the Bankruptcy Court.

At the date of bankruptcy the State of West Virginia owed Bankrupt $9,875 on account of the McDowell project, and there were unpaid bills for material aggregating approximately $13,884 on account thereof. By order of the Bankruptcy Court this sum was paid to Continental on December 5, 1940 (Finding 13, R. 29, Agreed Statement of Facts (10), R. 24). Continental then paid these outstanding bills on the McDowell County project and sustained a net loss of about $4,000.

Continental claims the balances due on the Nicholas and Jackson County projects, upon which Continental sustained no losses, to apply against the loss sustained by it on the subsequent McDowell County project.

Continental's claim is based upon two separate Indemnity Agreements identical in form (R. 6), executed by Bankrupt in connection with the Nicholas and Jackson County Projects on printed forms prepared by Continental. The pertinent parts of each Indemnity Agreement[4] pro-

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[4] The pertinent portions of the Indemnity Agreements are as follows (R. 7):

"Fourth, to assign, transfer and set over, and does or do hereby assign, transfer and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; * * * (3) of a default in discharging such other indebtedness or liabilities when due; * * * (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; * * * (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; * * *."

vide, (a) for an assignment by Bankrupt to Continental of certain rights, hereinafter defined, as collateral to secure (1) any obligations of Bankrupt to Continental growing out of the immediate contract, and (2) any other indebtedness or liability of Bankrupt to Continental thereafter incurred; (b) that the assignment was to become effective on default by Bankrupt in discharging such future indebtedness or liability *when due*; (c) that the assignment conveyed only such moneys as should be retained or due Bankrupt at the time of default.

The Referee found as a fact (R. 31):

> "No default occurred prior to bankruptcy and Surety's [Continental's] power to collect never arose, but if default did occur Surety never exercised its power prior to bankruptcy."

The Referee carried this finding into his conclusions of law Nos. 5 and 6 (R. 32).

In his certificate the Referee stated (R. 40):

> "In the case at bar there is no evidence whatever of any default by bankrupt prior to bankruptcy, so that even as between the parties, bankrupt had not only the power but the right to collect the proceeds of the contracts, up to the date of bankruptcy. * * *."

Continental is therefore clearly mistaken when it states (Pet. 2):

> "The Referee found as a fact that there was no default by Bankrupt in failing to pay for material when due, and held against Continental."[5]

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[5] Continental is also clearly mistaken when it states (Pet. 7) "The Referee found as a fact there was no default and held against the Petitioner surety," and again when it states (Pet. 8): "Bankrupt failed to pay bills for materials *which were due before bankruptcy.*" (Italics supplied.) There is no evidence in the record, and it was not stipulated, that the unpaid bills were due before bankruptcy. As the Circuit Court of Appeals states in its opinion (R. 67), "A contrary finding below [that there was a default before bankruptcy] would have been clearly erroneous."

The Referee's finding and conclusion were expressly confirmed by the District Court (R. 46), and by the Circuit Court of Appeals (R. 66).

DISCUSSION.

Continental throughout this litigation has conceded that under the terms of the respective assignments of the Nicholas and Jackson balances, Bankrupt had the right from time to time to collect and use all moneys becoming due and payable until default under the subsequent McDowell County contract. It was therefore necessary for Continental on its own theory of this case to prove that default occurred in the McDowell contract prior to bankruptcy.

I.

BOTH COURTS BELOW CONCURRED WITH THE REFEREE IN FINDING THAT NO DEFAULT OCCURRED PRIOR TO BANKRUPTCY.

Both Courts below concurred with the Referee in finding that there was no default by Bankrupt, prior to bankruptcy, and that Continental's failure to prove default prior to bankruptcy was fatal to its case.

The District Judge in his opinion stated (R. 46):

> "The factual situation presented here is very similar to that involved in Maryland Casualty Company's petition for review. There is, however, a distinguishing factor here which, as I see it, bars completely the surety's [Continental's] right to prevail over the trustee, and that is the failure of the surety to establish that a default occurred prior to bankruptcy.
>
> "It was determined in the Maryland case that assignments such as are involved here become effective only after default. Therefore, in order for the surety to claim priority over the trustee, it was essential that it show a default prior to bankruptcy, at which time the trustee's lien attached.

"No such showing having been made, the Referee's finding that there was no default is determinative of the case."

Continental filed a motion for rehearing in the District Court, which was overruled (R. 47).

In its appeal to the Circuit Court of Appeals, Continental claimed that as a matter of law default had occurred prior to bankruptcy.[6] The Circuit Court of Appeals stated in its opinion (R. 67) that it would not set aside concurrent findings of fact of the Referee and the District Judge, and

"* * * There has been no showing in this case that the Referee and the District Court were plainly mistaken in their concurring finding of the decisive fact. **Upon the evidence in the case a contrary finding below would have been clearly erroneous.**" (Emphasis supplied.)

Continental filed in the Circuit Court of Appeals a petition for rehearing upon the precise point of default prior to bankruptcy,[7] which petition for rehearing was denied (R. 79).

Under the familiar rule of this Court, factual findings concurred in by two courts will not be disturbed unless clear error is shown.[8]

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[6] "Designation of Points Relied on on Appeal" Nos. 4, 5 and 6 (R. 49).

[7] R. 69, 70, Pars. 4, 5 and 6. Also see Continental's "Amplifying Memorandum" filed with the petition for rehearing (R. 73).

[8] *Just v. Chambers* (1941) 312 U. S. 383, 85 L. ed. 903;

Williams Manufacturing Co. v. United Shoe Machinery Corp. (1942) 316 U. S. 364, 86 L. ed. 1537;

Alabama Power Company v. Ickes (1938) 302 U. S. 464, 467, 82 L. ed. 374, 377;

United States v. O'Donnell (1938) 303 U. S. 501, 508, 82 L. ed. 980, 984;

Pick Manufacturing Co. v. General Motors (1936) 299 U. S. 3, 81 L. ed. 4.

II.

THE REFEREE AND THE COURTS BELOW PROPERLY FOUND THERE WAS NO DEFAULT PRIOR TO BANKRUPTCY.

A. Continental complains (Pet. 12) that the Referee had no right to make a finding of fact since the case was submitted upon an agreed statement.

Rule 52(a) of the Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *."

General Order in Bankruptcy No. 37 provides:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. * * *."

General Order No. 47 provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. * * *."

Under Section 39a (8) of the Bankruptcy Act it is the duty of the Referee to:

> "Prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the finding and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits;"

In view of these explicit provisions it was the plain duty of the Referee and of the District Court to make specific findings of fact, whether the findings were based upon conflicting testimony or based upon a stipulation between the parties.

This Court in the recent case of *Kelley v. Everglades Drainage District* (June 1, 1943), 87 L. ed. Adv. Ops. 1091 held that it was the duty of the trial court under Rule 52(a) of the Rules of Civil Procedure and General Order No. 37 to find the facts specially and remanded the case because of the failure of the trial court to make adequate findings.

B. There is absolutely nothing in the record to show that the concurrent findings of the two courts below and the Referee are not in strict accord with the stipulated facts. At the date of bankruptcy the State of West Virginia owed Bankrupt a balance of $9,875.58 on the McDowell County project[9] and material bills in the amount of $13,884.66 were unpaid. But it nowhere appears that these bills became due and payable prior to bankruptcy. In fact, Continental stipulated (R. 25) and the Referee found (R. 30) that Continental paid no bills, received no notice of any bills, asserted no claim to the unpaid balances due on the Nicholas and Jackson County projects, and gave no notice of any claim to said balances either to bankrupt, the officials of West Virginia, or anyone else, until after bankruptcy. As the Circuit Court of Appeals says in its opinion (R. 67) a finding of default prior to bankruptcy "would have been clearly erroneous."

III.

THE DECISION OF THE CIRCUIT COURT IS NOT IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Continental urges (Pet. pp. 4, 10 and 15) that the decision below is "in conflict with the rule of law laid down by the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Employers Casualty Company v. Rockwell County*, 35 S. W. (2) 690, 692 (Texas 1931)." The

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[9] (R. 24) This amount was paid to Continental December 5, 1940, nearly ten months after bankruptcy.

case cited was not decided by the United States Circuit Court of Appeals for the Fifth Circuit. It was decided by the Supreme Court of Texas. Further, the facts of the Texas case are clearly distinguishable: Only one contract was involved; the contractor abandoned the uncompleted contract to the surety which completed it; it was shown without dispute (35 S. W. 692) that bills for labor and material were unpaid "in violation of the terms thereof"; and the contractor informed the surety of its inability to proceed. The court held there was a default which entitled the surety to the unpaid balance both under the terms of the indemnity agreement and by subrogation.

The case of *Nelson v. Montgomery Ward Co.*, 312 U. S. 373, cited by Continental, is not in point. Of course the effect of admitted facts is a question of law. In the case at bar the fact of default prior to bankruptcy was not admitted.

IV.

CONTINENTAL, IN ITS PETITION FOR A WRIT OF CERTIORARI, HAS NOT BROUGHT FORWARD THE QUESTION OF THE VALIDITY OF THE ASSIGNMENTS AS AGAINST THE RESPONDENT, EVEN IF DEFAULT OCCURRED PRIOR TO BANKRUPTCY AND THEREFORE COULD NOT SECURE AFFIRMATIVE RELIEF EVEN IF THE PETITION WERE GRANTED.

Under the Rules of this Court, it is provided:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." Rule 38, Paragraph 2.

Helis v. Ward (1939) 308 U. S. 365, 370; 84 L. ed. 327, 329;

National Licorice Co. v. National Labor Relations Board (1940) 309 U. S. 350, 357; 84 L. ed. 799, 807;

Dickinson Industrial Site v. Cowan (1940) 309 U. S. 382, 389; 84 L. ed. 819, 825.

Continental has not brought forward in its petition for a writ of certiorari the basic question involved in this case. The basic question is whether the purported assignments by Bankrupt of the Nicholas and Jackson County balances are valid as against the assignor's trustee in bankruptcy to reimburse Continental for the loss it sustained in connection with the McDowell County project. This question is not raised or discussed by Continental either in its petition for a writ of certiorari or the supporting brief.

Respondent contends and the Referee held[10] that since default did not occur prior to bankruptcy, Continental's power to collect never arose, but even if it did then both under the rule of this Court in *Benedict v. Ratner* (1935) 268 U. S. 351 and under the applicable state decisions the assignments are void as against the Trustee irrespective of the time when default occurred because of the unfettered dominion over the funds in dispute which Continental agreed Bankrupt should have.

Even if the petition for a Writ of Certiorari were granted, Continental has not brought before this Court the questions necessary for the relief it claims.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[10] Conclusions 5 and 6, R. 32, Certificate R. 40.